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CHAPTER IX : LEGISLATION AND TORT LIABILITY 673

Phillips v. Britannia Hygienic Laundry Co. 674
Transport Oil Ltd. v. Imperial Oil Ltd. 681
Sterling Trusts Corpn. v. Postma 685
Leask Timber and Hardward Pty. Ltd. v. Thorne 701
Gorris v. Scott 707
Chipchase v. British Titan Products Co. Ltd. 712
Sdraulig v. Canadian Pacific Railway Co. 714

CHAPTER X : LIMITATIONS ON LIABILITY IN NEGLIGENCE BECAUSE OF THE NATURE OF THE DEFENDANT'S CONDUCT AND/OR THE NATURE OF THE PLAINTIFF'S INTEREST: HEREIN OF FAILURE TO ACT AS NEGLIGENCE, NEGLIGENTLY CAUSED NERVOUS SHOCK, AND NEGLIGENT MISREPRESENTATION RESULTING IN ECONOMIC LOSS 724

(a) Failure to Act as Negligence: Herein of Duties of Affirmative Action 724

Miller v. Brown Ltd. v. City of Vancouver 725
H.R. Moch Co. v. Rensselaer Water Co. 726
Vanvalkenburg v. Northern Navigation Co. 727
L.S. Ayres & Co. v. Hicks 739
Zelenko v. Gimbel Bros. 746
Matthews v. MacLaren 746
Baxter & Co. v. Jones 758

(b) Negligently Caused Nervous Shock 763

Hambrook v. Stokes Brothers 763
Hay (or Bourhill) v. Young 771
King v. Phillips 779
Marshall v. Lionel Enterprises Inc. 794
Chadwick v. British Transport Commission 800

(c) Negligent Misrepresentation Resulting in Economic Loss 810

Candler v. Crane, Christmas & Co. 811
Hedley Byrne & Co. v. Heller & Partners Ltd. 819
Mutual Life and Citizen's Assurance Co. Ltd. v. Evatt 841
Holman Construction v. Delta Timber 856
Esso Petroleum Co. Ltd. v. Mardon 857
Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg 863

CHAPTER XI : DEFENCES TO NEGLIGENCE ACTIONS: VOLUNTARY ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE 869

(a) Voluntary Assumption of Risk 869

Leva v. Lam 870
White v. Blackmore 871
Rootes v. Shelton 881
Lehnert v. Stein 888

(b) Contributory Negligence 897

Butterfield v. Forrester 897
Davies v. Mann 898

Wells v. Russell 902
MacLaughlin v. Long 903
Davies v. Swan Motor Co. (Swansea) Ltd. 906
Great Eastern Oil & Import Co. v. Frederick E. Best Motor Accessories Co. Ltd. 912
R.A. Beamish Stores Co. Ltd. v. F.W. Argue Ltd. 914
Yuan v. Farstad 921
Froom v. Butcher 927

CHAPTER XII : TORT LIABILITY OF OCCUPIERS AND OWNERS OF LAND: HEREIN OF STRICT LIABILITY 937

Pontardawe Rural District Council v. Moore-Gwyn 939
Goldman v. Hargrave 940
Mint v. Good 946
Atwell v. Knights 951
Spur Industries, Inc. v. Del E. Webb Development Co. 954
City of Portage La Prairie v. B.C. Peagrowers Ltd. 959
Smith v. Scott 962
Hardcastle v. South Yorkshire Railway and River Dun Company 965
British Railways Board v. Herrington 968
Phipps v. Rochester Corporation 985
Indermaur v. Dames 1002
London Graving Dock Co. Ltd. v. Horton 1005
Jacobs v. London County Council 1012
Sinclair v. Hudson Coal & Fuel Oil Ltd. 1018
Rowland v. Christian 1022
Fletcher v. Rylands 1027
Rickards v. Lothian 1031
Read v. J. Lyons & Company, Limited 1034
Behrens v. Bertram Mills Circus Ltd. 1042

CHAPTER IX

LEGISLATION AND TORT LIABILITY

"The common law treatment of legislation has never been happy. The manner in which statutes are used--and sometimes abused--in determining the incidence of civil liability is no exception." (Wright, Cases on the Law of Torts, 4th ed., 1967, at p. 284).

The traditional approach of the English and Canadian courts when faced with the violation of a statute in a tort action has been to look for the intention of the legislature. Did the legislature when it enacted the statute intend to affect civil liability? This approach is understandable when the legislature clearly expresses its intention with respect to civil liability. (As, for example, the Ontario legislature did when it enacted sections 29 and 30 of the Highway Improvement Act, R.S.O. 1970, c. 201. Section 29 makes it an offence subject to fine for the owners of horses, cattle, etc., to permit their animals to run at large on a highway. The section goes on to provide: "but this section does not create civil liability on the part of the owner of the animal for damage caused to the property of others as a result of the animal running at large". Section 30 imposes an obligation on the Department of Highways to repair certain highways and then goes on to provide that: "in case of default by the Department to keep the King's Highway in repair, the Crown is liable for all damage sustained by any person by reason of the default".).

But when the legislation is silent on the issue of civil liability the ordinary canons of statutory construction will rarely yield a positive intention to affect civil liability. As Prosser has said (Prosser & Smith, Cases and Materials on Torts, 3rd ed., 1962, at p. 225): "What is the probability as to the state of mind of the legislature: (1) it did intend to provide a civil remedy, but did not say so; (2) it intended not to provide one, and therefore omitted it; (3) it never thought about the matter at all?" However, the silence of the legislature has not deterred the courts in tort actions from pursuing this "will-o'-the-wisp of a non-existent legislative intention" (Harper & James, Torts, 1956, vol. 2, at p. 995, n. 5). It is some consolation to tort lawyers to know that the courts are prepared to pursue this fiction in contract cases as well: see Stewart v. Park Manor Motors Ltd. (1967), 66 D.L.R. (2d) 143 (Ont., C.A.).

In a country of divided legislative jurisdiction like Canada this pursuit of legislative intention can have constitutional implications. Section 92(13) of the British North America Act, 1867, 30-31 Vict., c. 3, gives the provinces legislative jurisdiction over property and civil rights. As a result, a finding that Parliament intended to affect civil liability when it enacted a statute would in many cases make the statute ultra vires. See, for example, MacDonald v. Vapour Canada Ltd. (1976), 66 D.L.R. (3d) 1 (S.C.C.).

Probably the most serious objection to the courts' pursuit of non-existent legislative intentions is that the judges are apt to believe that the legislatures control the effect of legislation on tort liability, when the legislation is silent. Perhaps the most revealing example of this self-delusion is found in Lord du Parcq's judgment in Cutler v. Wandsworth Stadium Ltd., [1949] A.C. 398 (H.L.), where he said (at p. 410):

> "To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be. There are no doubt reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned."

Despite such sophistry, of course it is the courts who control the effect of a violation of a statute on tort liability when the legislature has been silent. It is for the courts to say whether a violation is relevant and, if so, in what way.

PHILLIPS *v.* BRITANNIA HYGIENIC LAUNDRY CO.

Court of Appeal. [1923] 2 K.B. 832

APPEAL from the judgment of a Divisional Court. (1)

The plaintiff brought an action in the Lambeth County Court against the defendants in the following circumstances: While the defendants' servant was driving their motor lorry in Camberwell New Road, one of the axles broke in two, a wheel came off, ran along the road and struck and damaged the plaintiff's van. About seven weeks before this the defendants had sent the lorry to the makers, Messrs. Thornycroft, a firm of admitted competence and repute, to be overhauled and repaired. Messrs. Thornycroft's men replaced one worn axle with a new one, and rethreaded and annealed the other, which was seen to be defective; they did not consider it necessary to replace it with a new axle. The repairs, in respect of which no restriction was put by the defendants, cost nearly 200*l*. The motor lorry was sent back to the defendants two days only before the accident.

The plaintiff's particulars of claim in the action were based on the alleged negligence of the defendants, but at the trial the plaintiff also relied upon other grounds, the main one being that the defendants had been guilty of a breach of art. II., cl. 6, of the Motor Cars (Use and Construction) Order, 1904, made under the Locomotives on Highways Act, 1896 (2), and that the breach of the regulation caused the damage.

The county court judge held that the defendants were not negligent, but that Messrs. Thornycroft were negligent in not having replaced the defective axle with a new one, and he gave judgment for the plaintiff for 17*l*. 10*s*., basing his decision on the defendants' breach of above-mentioned art. II., cl. 6, which breach, as he found, caused the damage to the plaintiff.

On appeal the Divisional Court (McCardie and Bailhache JJ.) reversed the judgment of the county court judge and entered judgment for the defendants.

The plaintiff appealed.

Harney K.C., Martin O'Connor and J.P. Rutherford for the appellant.

CHAPTER X

LIMITATIONS ON LIABILITY IN NEGLIGENCE BECAUSE OF THE NATURE OF THE DEFENDANT'S CONDUCT AND/OR THE NATURE OF THE PLAINTIFF'S INTEREST: HEREIN OF FAILURE TO ACT AS NEGLIGENCE, NEGLIGENTLY CAUSED NERVOUS SHOCK, AND NEGLIGENT MISREPRESENTATION RESULTING IN ECONOMIC LOSS

The relationship between the matters brought together in this chapter lies primarily in the fact that they have received special treatment by the Courts. This special treatment has arisen either because of the nature of the defendant's conduct or the nature of the plaintiff's interest interfered with, or because of a combination of these two factors. Even though this special treatment is the main reason for bringing these apparently disparate matters together, there seems to be an affinity between some of the cases in section (a) and some of the cases in section (c). This lies in the fact that underlying the imposition of a duty of care in these cases is a voluntary assumption of responsibility by the defendant.

(a) Failure to Act as Negligence: Herein of Duties of Affirmative Action

In his famous generalization in Donoghue v. Stevenson (supra, p. 524) about duties of care in negligence, Lord Atkin emphasized reasonable foreseeability of harm to one's neighbours as the foundation of such duties. If a defendant (or rather a reasonable man in his circumstances) could not foresee harm to anyone resulting from his conduct he owed no duty with respect to that conduct. If the defendant could not foresee harm to a particular plaintiff he owed him no duty of care, even though he might owe a duty to another to whom he could foresee harm (Palsgraf v. Long Island R. Co., supra, p. 537).

Lord Atkin's generalization provides a reasonably satisfactory explanation of the existence of a duty of care in those cases in which a defendant actively creates a risk of harm to a plaintiff's person or tangible property. Not entirely satisfactory because, as we have seen, the duty issue being basically one of policy, no single test such as reasonable foreseeability will always be determinative. But where the defendant's conduct involves inaction and the plaintiff is claiming that the defendant owed him a duty of affirmative action Lord Atkin's generalization breaks down. The general policy of the common law of torts has been to refuse to impose duties of affirmative action.

From earliest times tort law has drawn a distinction between misfeasance and nonfeasance, between conduct actively creating risks of harm to others, and conduct involving merely a failure to confer benefits on others. Before a defendant will be liable for nonfeasance he must owe a plaintiff a duty of affirmative action. Such a duty is imposed on a defendant, not on the basis of reasonable foreseeability of harm to the plaintiff if he does not act, or at least not on that basis alone, but primarily on the basis of a special relationship existing between the defendant and the plaintiff or the defendant and a third person. These special relationships justify the imposition of duties of affirmative action. Aside from special relationships, there may be other special situations in which duties of affirmative action will be owed.

We have already seen cases in which the relationship between the defendant and a third person has justified the imposition of a duty of affirmative action on the defendant to use reasonable care to control the conduct of that third person so as to prevent injury to the plaintiff. For example, the duty of the teacher or parent to control the conduct of a child (Carmarthenshire County Council v. Lewis, supra, p. 400), and the duty of prison authorities to control the conduct of prisoners (Home Office v. Dorset Yacht Co., supra, p. 602). In this section we are concerned mainly with the special relationships between plaintiffs and defendants that may justify the imposition of duties of affirmative action.

But apart from special relationships as the foundation of duties of affirmative action, there may be situations where a defendant voluntarily assumes a legal obligation to a plaintiff. From one point of view this raises the problem of when nonfeasance becomes misfeasance: when does conduct change from inactivity, where the defendant is only liable if he owes a duty to the plaintiff, to activity, where the defendant is liable if he fails to use reasonable care. And it is at this point that the affinity between the cases in this section and the cases in section (c) becomes apparent..

MILLER & BROWN LTD. v. CITY OF VANCOUVER
British Columbia Court of Appeal. (1966), 59 D.L.R. (2d) 640

The judgment of the Court was delivered orally by

DAVEY, J.A.:—While the respondent's truck was driving along 12th Avenue in the City of Vancouver in a proper manner, it collided with a bough, a substantial bough of an overhanging tree, that had been planted by the city many years ago on the boulevard. The collision damaged the truck. The respondent sued the city for the damage so resulting.

Mr. Justice Gregory who conducted the trial found in favour of the respondent. The appellant city appeals on the ground that under the *Vancouver Charter*, 1953 (B.C.), c. 55, as it is now drawn it is liable in negligence or nuisance only for acts of misfeasance and not for nuisance or negligence resulting from non-feasance. I think it is clear under the present *Vancouver Charter* that counsel's submission in that respect is correct, and that the City of Vancouver is liable in nuisance or in negligence only for acts of misfeasance.

In his reasons for judgment the learned trial Judge, after having held that the city was liable both in negligence and in nuisance, found that the negligence and nuisance resulted from acts of misfeasance and not from mere non-feasance. He said this, and I quote [56 D.L.R. (2d) 190 at p. 192]:

> Viewed in this light I have reached the conclusion that the City of Vancouver was guilty of misfeasance in planting a tree so close to the street that when it grew in the normal way its boughs would interfere with the normal and proper use of the street and to make no provision for trimming its boughs to prevent their doing so.

It seems quite clear to me, with respect to the learned trial Judge, that when that tree was first planted it was no impediment to people using the street, and only became so in the course of years when it grew to such an extent that its overhanging boughs projected onto the highway and beyond the curb lane. The city's failure to cut and lop the branches and trim the tree when that danger arose was mere non-feasance for which it is not liable. I do not think, as I read the judgment, that the learned trial Judge if he accepted that premise would disagree with the conclusion, but in the passage which I have just quoted he seems, as I understand it, to have concluded that when the city planted the tree it was necessary at that time to make some provision for the future lopping of the tree when the need arose, and because the tree was planted without making any provision for future lopping years thence, that the planting of the tree then constituted a source of danger and was an act of misfeasance. With that, with

CHAPTER XI: DEFENCES TO NEGLIGENCE ACTIONS: VOLUNTARY ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

We saw in Chapter VI that in a negligence action the plaintiff usually has the burden of establishing the defendant's negligence. Conversely, as you might expect, the defendant has the burden of establishing the defences of voluntary assumption of risk and contributory negligence.

At common law a plaintiff who had voluntarily assumed the risk or who had been guilty of contributory negligence was denied any recovery against the negligent defendant. Because both defences were complete bars to a plaintiff it was unnecessary to distinguish between them. Indeed they often overlapped. Today, however, because of apportionment legislation in many jurisdictions (including all the common law provinces of Canada), it is necessary to distinguish the two defences because, although voluntary assumption of risk is still a complete bar to a plaintiff's recovery, contributory negligence is not.

Although at common law the result of the two defences was the same, the techniques used to arrive at this result were quite different. The defendant who pleaded voluntary assumption of risk to a plaintiff's negligence action was saying: "Yes, I created an unreasonable risk of injuring the plaintiff by my conduct, but I owed him no duty of care and therefore I am not liable to him for his injuries because he voluntarily assumed that risk." On the other hand the defendant who pleaded contributory negligence to a plaintiff's negligence action was saying: "Yes, I created an unreasonable risk of injuring the plaintiff, and I owed him a duty of care, but I am not liable to him for his injuries because he too was guilty of negligence and his negligence relieves me of all liability."

(a) Voluntary Assumption of Risk

"'Voluntary assumption of risk' as a defence to negligence corresponds to the plea of 'consent' in actions for intended harm. Both are expressions of the same philosophy of individualism, that no wrong is done to one who consents: volenti non fit injuria.": (Fleming, Law of Torts, 4th ed. 1971, at p. 239). We dealt with the defence of consent to intentional torts in Chapter IV, supra.

The nineteenth century stronghold of the defence of assumption of risk was the employer-employee relationship. An employee who was aware of a dangerous condition in that part of his employer's premises in which he worked and yet continued on with his job was held to have voluntarily assumed the risks of that condition. However, the House of Lords in Smith v. Baker, [1891] A.C. 325, held that the worker's remedy against his employer was not lost unless he had agreed that if an injury should befall him, the risk was to be his and not his masters, and that an inference of such an agreement could not be drawn merely from the fact that he exposed himself to a danger of which he was fully aware. The determining factor in Smith v. Baker was a recognition of the absence of true bargaining equality between employer and employee and that, therefore, the employee's encountering of a known danger could in no real sense be held to be voluntary. As a result of Smith v. Baker the defence of voluntary

assumption of risk virtually disappeared from the employment relationship. In addition, most workers today are protected by workmen's compensation legislation (in Ontario the Workmen's Compensation Act, R.S.O. 1970, c. 505) under which voluntary assumption of risk is irrelevant because entitlement to benefits does not depend on proof of the employer's fault.

As we will see there seems to be some confusion between cases involving express agreements (often a matter of contract) under which one of the parties agrees to assume certain risks involved in the other party's conduct, and cases involving implied assumption of risk where there is a less formal relationship between the parties. Another source of confusion is the view expressed in the sports cases that the competitor or spectator voluntarily assumes the risks inherent in the particular sport. This seems wrong because voluntary assumption of risk as properly understood presupposes negligent conduct on the defendant's part. As to the risks inherent in a particular sport a promoter or competitor has not been negligent.

LEVA v. LAM
Ontario Court of Appeal. (1972), 25 D.L.R. (3d) 513

The judgment of the Court was delivered orally by

AYLESWORTH, J.A.:—The defendants appeal from a judgment awarded the respondent for damage to the respondent's car occasioned to it in the parking lot of the appellant Lam. The respondent drove her car on to the parking lot for the purpose of parking it on the lot and paying for that privilege. The attendant, the employee of the appellant, volunteered to park the car for her and in attempting to do so — and before the car ever reached the parking space which it was intended it should occupy — it was damaged through the admitted negligence of that employee.

Liability is sought to be excluded, so far as the owner of the parking lot is concerned, by virtue of the wording of the form of parking ticket generally in use by the lot owner. In fact, upon the occasion in question, no parking ticket was tendered to or received by the respondent car owner; but by agreement between counsel any consideration of that fact is obviated because they have agreed that the case shall be treated as though a parking ticket had been delivered and as though that parking ticket had upon it the following exclusion from liability, and I quote:

> Charges are for use of parking space only. The company assumes no responsibility for loss through fire, theft, collision or otherwise to the car or its contents, whether due to negligence or otherwise.
>
> CARS PARKED AT OWNER'S RISK.

Obviously, the exclusion, in our view, applies to damage to the car when parked on the lot. We do not consider that the exclusion on the words used can be extended to apply to that which happened here, namely, negligent damage by the lot owner or his employee to the car in an attempt by such employee to put the car in a parking space, and use of that space is what the respondent, on the terms of the contract, was to pay for.

Reading the exclusion from liability strictly therefore, as we are bound to do, we conclude that the words used are not sufficiently broad and are not sufficiently specific to exclude from liability the damage to the car occasioned as I have stated.

The appeal is dismissed with costs.

Appeal dismissed.

CHAPTER XII: TORT LIABILITY OF OCCUPIERS AND OWNERS OF LAND: HEREIN OF STRICT LIABILITY

As Dean Wright points out in his introduction to the subject of occupiers' liability (Wright, Cases on the Law of Torts, 4th ed. 1967, at p. 667): "In a broad way, the cases have attempted to distinguish between persons outside the premises causing damage and those who come on. Because the action of "nuisance", historically, covered most of the persons outside the premises, liability has, to a great extent, developed under that rubric. Originally, as in the case of "trespass", little attention was paid to the conduct by which an actionable "nuisance" arose. Today, such as inquiry would seem of paramount importance."

We encountered the concept of nuisance earlier in the year. In Hickey v. Electric Reduction Co. of Canada, Ltd., at p. 226 of the casebook, supra, we saw that the private citizen who is complaining of a so-called "public" nuisance - in that case pollution of public waters - has to prove that he has suffered "special" damage. As Attorney-General for Ontario v. Orange Productions Ltd., at p. 228 of the casebook, supra, indicates, the public can also complain about a "public" nuisance. In this chapter in addition to cases of "public" nuisance, in which the plaintiff has suffered "special" damage, we will also see cases of "private" nuisance. In distinguishing between the two, Fleming says (Fleming, Law of Torts, 4th ed. 1971, at p. 340): "Private nuisance traditionally was, and still is, confined to invasions of the interest in the use and enjoyment of land, although occasionally an occupier may recover for incidental injury sustained by him in the exercise of an interest in land, such as for illness caused by noxious gases from an adjoining factory. A public nuisance, in contrast, confers a cause of action for damages on anyone sustaining personal injury or other loss, although no rights or privileges in land of his have been invaded at all."

Again quoting Fleming (at p. 338): "Because of the large variety of situations encompassed by the term, the crucial feature is easily obscured that nuisance is a field of tort liability rather than any particular type of tortious conduct." The really difficult problem in analysing some of the nuisance cases, as we will see, is to determine the basis of liability. Many of the cases say that negligence is not a prerequisite to liability in nuisance but on close analysis of these cases it would seem that some form of fault is present. In The Wagon Mound (No. 2), at p. 589 of the casebook, supra, the Privy Council held that the same test of remoteness of damage applies in negligence and in nuisance: was the kind of damage reasonably foreseeable? In giving judgment, Lord Reid said (at p. 592, supra): "It is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts or omissions, and in many negligence in the narrow sense is not essential. An occupier may incur liability for the emission of noxious fumes or noise, although he has used the utmost care in building and using his premises. The amount of noise and fumes which he can lawfully emit is a question of degree, and he or his advisers may have miscalculated what can be justified. Or he may deliberately obstruct the highway adjoining his premises to a greater degree than is permissible hoping that no one will object. On the other hand the emission of fumes or noise or the obstruction of the adjoining highway may often be the result of pure negligence on his part: there are many cases... where precisely the same facts will establish liability both in nuisance and in negligence. And although negligence may not be necessary, fault of some kind is almost always necessary..."

With respect to those injured on the occupier's premises, the common law developed categories. One who went on another's land without his permission was a trespasser. One who had his permission, but conferred no economic benefit on the occupier, was a licensee. One who had his permission and conferred an economic benefit on him was an invitee. A different obligation was owed by the occupier to each of these visitors, but even to an invitee the obligation fell short of a duty of reasonable care.

The common law's approach to those injured on the occupier's premises is inconsistent with the modern tort tendency to establish duties of care in negligence by reference to reasonable foresight of harm. The categories evolved in the early and mid-19th century, well before the first judicial attempt to generalize the duty issue in negligence. The categories were created at a time when the economic and social importance of land justified its preferential treatment by the law.

With a reduction in the economic and social importance of land in the 20th century, and with a developing philosophy of negligence, there arose an increasing dissatisfaction with the rigidity and formalism of the categories, which often seemed to dictate unjust results. In recent years this dissatisfaction has resulted in legislative reform in a number of jurisdictions, including England, Scotland, and New Zealand, and in Canada in Alberta (Occupiers' Liability Act, S.A. 1973, c. 79) and British Columbia (Occupiers' Liability Act, S.B.C. 1974, c. 60), as well as in proposals for such reform in a number of other jurisdictions, including Ontario. In England the Occupiers' Liability Act, 1957, 5 & 6 Eliz. 11, c. 31, provides (s. 2(1)) for a "common duty of care" to all lawful visitors. The "common duty of care" is defined (s. 2(2)) as "a duty to take such care as in all the circumstances of the case is reasonable". The English Act does not deal with the common law rules with respect to trespassers. In 1972 the Ontario Law Reform Commission proposed similar legislation for Ontario. The proposed Ontario statute is set out, infra. The rationale of most legislative reform has been the feeling that the courts are incapable of rationalizing the common law of occupiers' liability. Some of the cases in this chapter cast doubt on this conclusion.

The last few cases in this chapter are concerned with the few situations in which the common law has expressly imposed strict liability. The affinity between a case like Rylands v. Fletcher, infra, and many of the nuisance cases near the beginning of this chapter is clear. The possible expansion of Rylands v. Fletcher into a general doctrine of strict liability for dangerous activities received a severe set-back with the House of Lords' decision in Read v. Lyons, infra. As Dean Wright says (Wright, Cases on the Law of Torts, 4th ed. 1967, at p. 786): "how far the doctrine of Rylands v. Fletcher is tied to 'land' cases must still be considered a question of doubt, particularly in view of the decision of the House of Lords in Read v. Lyons ...". Whether, since it is no longer bound by its prior decisions, the House of Lords will reconsider its views on strict liability remains to be seen. The American courts have gone much further in imposing strict liability than have ours, particularly with respect to defective products.

It may be that there has been little impetus in England (or in Canada) to develop strict liability because in many cases it is being imposed indirectly under the guise of negligence. Arguably, by means of an objective standard of care, and devices like res ipsa loquitur and breach of statute, along with the impact of liability insurance, in many situations negligence liability is becoming in fact a form of strict liability. No-fault automobile compensation is one area of strict liability in which in recent years there has been a great deal of academic writing and some legislative action. The last few pages of this chapter contain excerpts from the recent Ontario Law Reform Commission Report on this subject (Report on Motor Vehicle Accident Compensation, Ministry of the Attorney-General, 1973).